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No. 92-1336

In the Supreme Court of the United States

OCTOBER TERM, 1992

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
PETITIONERS

v.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Exemption 3 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(3), applies to meetings during which the Defense Nuclear Facilities Safety Board discusses recommendations for the Secretary of Energy or the President regarding the safety of defense nuclear facilities.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 969 F.2d 1248.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1992. A petition for rehearing was denied on October 9, 1992. Pet. App. 15a-18a. On December 23, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 8, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Government in the Sunshine Act, 5 U.S.C. 552b, generally requires meetings of federal collegial agencies to "be open to public observation." 5 U.S.C. 552b(b). That requirement does not apply, however, to any part of a meeting or information about a meeting that falls within any of ten exemptions. See 5 U.S.C. 552b(c)(1)-(10). The exemption involved in the present case, Exemption 3, removes from the open-meeting requirement any part of a meeting or information about a meeting that is likely to

> disclose matters specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. 552b(c)(3).

2. The Defense Nuclear Facilities Safety Board (Board) is an independent establishment in the Executive Branch that was created in 1988 to oversee the safety of "Department of Energy defense nuclear facilities," which are nuclear production, utilization, and waste-storage facilities operated for national security purposes under the jurisdiction of the Department of Energy (DOE). See National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, Tit. XIV, § 1441(a)(1), 102 Stat. 2076 (1988) (codified at 42 U.S.C. 2286-2286i); see also 42 U.S.C. 2286g (defining "Department of Energy defense nuclear facility"). The Board is composed of five members appointed by the President with the advice

and consent of the Senate. 42 U.S.C. 2286(b)(1). The members of the Board must be "respected experts in the field of nuclear safety," and they cannot be associated with DOE. 42 U.S.C. 2286(a), (b)(1) and (3).

The Board has five duties pertaining to DOE defense nuclear facilities under its enabling Act. It evaluates the standards for building, operating, and decommissioning facilities. 42 U.S.C. 2286a(1). It investigates any event at a facility that "has adversely affected, or may adversely affect, public health and safety." 42 U.S.C. 2286a(2). It analyzes safety data on the facilities. 42 U.S.C. 2286a(3). It reviews designs for the construction of new facilities. 42 U.S.C. 2286a(4). Finally, and most importantly for the present case, it makes recommendations to the Secretary of Energy regarding the safety of facilities. In particular, the Board makes recommendations regarding the construction of new facilities. *Ibid.* More broadly, the Board makes "such recommendations to the Secretary of Energy with respect to [DOE] defense nuclear facilities, including operations of such facilities, standards, and research needs, as the Board determines are necessary to ensure adequate protection of public health and safety." 42 U.S.C. 2286a(5).

The disposition of the Board's safety recommendations is the subject of a detailed, separate provision in the Board's enabling Act: 42 U.S.C. 2286d. Section 2286d contemplates that the Board will transmit its recommendations to the Secretary of Energy. Then, under subsection (a) of Section 2286d:

> after receipt by the Secretary of Energy of any recommendations from the Board * * *, the Board

> promptly shall make such recommendations available to the public in the [DOE's] regional public reading rooms and shall publish in the Federal Register such recommendations and a request for the submission to the Board of public comments on such recommendations. Interested persons shall have 30 days after the date of the publication of such notice in which to submit comments, data, views, or arguments to the Board concerning the recommendations.

42 U.S.C. 2286d(a). Under subsection (b) of Section 2286d, the Secretary must respond in writing to the Board's recommendation within 45 days after receiving it. 42 U.S.C. 2286d(b)(1). Also under subsection (b), "[a]t the same time as the Secretary * * * transmits [her] response to the Board," she must "publish such response, together with a request for public comment on [her] response, in the Federal Register." 42 U.S.C. 2286d(b)(2). Interested persons then have 30 days to submit comments to the Board on the Secretary's response. 42 U.S.C. 2286d(b)(3). In addition, "[t]he Board may hold hearings for the purpose of obtaining public comments on its recommendations and the Secretary of Energy's response." 42 U.S.C. 2286d(b)(4).

If the Secretary of Energy rejects the Board's recommendation in whole or in part, the Board may, under subsection (d) of Section 2286d, either reaffirm or revise its recommendation. 42 U.S.C. 2286d(d). In either case, the Secretary must, "[w]ithin 30 days after receiving the notice of the Board's action," reach "a final decision on whether to implement all or part of the Board's recommendations." *Ibid.* The

Secretary is required to publish her final decision in the Federal Register and send it to the Committees on Armed Services and on Appropriations of the Senate and to the Speaker of the House. *Ibid.* She then has 90 days within which to submit to the Board a plan for implementing any recommendations or parts of recommendations that she accepted in her final decision. 42 U.S.C. 2286d(e).

The disposition of a Board recommendation differs somewhat when the recommendation "relates to an imminent or severe threat to public health and safety." 42 U.S.C. 2286d(g)(1). In that case, subsection (g)(2) of Section 2286d provides that "[a]t the same time that the Board transmits [the] recommendation * * * to the Secretary of Energy, the Board shall also transmit the recommendation to the President." 42 U.S.C. 2286d(g)(2). Then, under subsection (g)(3) of Section 2286d:

> [a]fter receipt by the President * * *, the Board promptly shall make such recommendation available to the public and shall transmit such recommendation to the Committees on Armed Services and on Appropriations of the Senate and to the Speaker of the House of Representatives.

42 U.S.C. 2286d(g)(3). The Secretary similarly must submit to the President her response to Board's recommendation. 42 U.S.C. 2286d(g)(2). It is the President, rather than the Secretary, who "make[s] the decision concerning acceptance or rejection of the Board's recommendation." *Ibid.*

3. In *Energy Research Foundation* v. *Defense Nuclear Facilities Safety Board*, 917 F.2d 581 (1990), the D.C. Circuit held that the Board is an "agency"

within the meaning of the Sunshine Act, 5 U.S.C. 552b(a)(1). In response to that holding, the Board promulgated regulations implementing the Sunshine Act. 56 Fed. Reg. 9609 (1991) (codified at 10 C.F.R. 1704.1-1704.10). The Board's regulation implementing Exemption 3 begins by tracking the Sunshine Act:

> [A] meeting may be closed and information pertinent to such meeting * * * may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:
>
> * * * * *
>
> (c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute:
>
> (1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

10 C.F.R. 1704.4(c). The regulation then states that it "applies to Board meetings, or portions of meetings, involving deliberations regarding recommendations which, under 42 U.S.C. 2286d(a) and (g)(3), may not be made publicly available until after they have been received by the Secretary of Energy or the President, respectively." *Ibid.*

4. a. Petitioners filed a petition for review in the D.C. Circuit challenging the Board's regulation implementing Exemption 3 of the Sunshine Act. See

5 U.S.C. 552b(g) (providing for judicial review of Sunshine Act regulations in D.C. Circuit). Petitioners argued that the Board could not rely upon Exemption 3 to close meetings in which recommendations to the Secretary of Energy or the President were discussed, because, in their view, the provisions of the Board's enabling Act cited in the Board's Exemption 3 regulation—42 U.S.C. 2286d(a) and (g)(3)—do not prohibit disclosure of those recommendations prior to their receipt by the Secretary or the President.

The court of appeals denied the petition for review. Pet. App. 1a-14a.[1] Although the court determined that the Board's interpretation of the Sunshine Act was not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it nonetheless sustained that interpretation as "the correct one." Pet. App. 6a. The court observed that "Section 2286d(a), which was enacted after the Sunshine Act, requires that the Board make its 'recommendations available to the public in the Department of Energy's regional public reading rooms' promptly '*after* receipt by the Secretary.'" *Ibid.* (quoting, with emphasis, 42 U.S.C. 2286d(a)). The court determined that "when read in context, 'after' means 'only after.'" Pet. App. 6a. It explained that "[t]his careful mechanism for the time

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[1] Petitioners incorrectly assert (Pet. 16 n.3) that the Department of Justice did not appear in the court of appeals. In fact, the Department appeared through the General Counsel and an Associate General Counsel of the Board, who were appointed Special Attorneys to the United States Attorney for purposes of this case pursuant to 28 U.S.C. 515(b).

controlled disclosure of the recommendations would be unnecessary if they were generally available to the public at an earlier stage through the Sunshine Act." *Ibid.* The court accordingly concluded that Sections 2286d(a) and 2286d(g)(3) are Exemption 3 statutes "[b]ecause they require the withholding of the recommendations until after they have been received by the Secretary or the President." Pet. App. 6a.

The court rejected petitioners' reliance upon *United States Department of Justice* v. *Julian*, 486 U.S. 1, 8-11 (1988), which involved the parallel provision of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3). Pet. App. 6a-8a. *Julian*, the court of appeals observed, concerned a criminal rule and statute that "require[d] sentencing courts and parole boards to provide defendants and inmates with their presentence reports no later than the times specified," but that "contain[ed] no language expressly denying defendants and inmates access to their reports at other times." Pet. App. 7a. The holding in *Julian* that the rule and statute were not Exemption 3 provisions did not apply here, the appeals court explained, because the Board's statute "requires that the information be made available to the public *after* a specific event, thereby precluding the *public* disclosure of recommendations dealing with highly sensitive matters before they reach the person or persons to whom they are directed." Pet. App. 8a.[2]

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[2] In addition, the appeals court noted, the disclosure authorized in *Julian* was to "the subjects of the presentence reports," and not to "the public at large." Pet. App. 8a.

b. Judge Williams dissented, Pet. App. 9a-14a, stating that he found "no evidence that Congress thought it was picking the delivery of recommendations to the Secretary as the *first* acceptable moment for disclosure." *Id.* at 12a.

5. Petitioners' petition for rehearing and suggestion of rehearing en banc were denied. Pet. App. 15a-18a. Judge Williams filed a statement concurring in the denial of rehearing en banc. *Id.* at 17a. He explained that although he believed the panel had erred, "it is hard to classify the dispute as one of 'exceptional importance' or where *en banc* treatment is truly 'necessary' to maintain uniformity of circuit law," since "the decision is evidently driven by some idiosyncratic feature of 42 U.S.C. § 2286d(a) (1988)." *Ibid.*[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision does not present an issue of broad significance, as it rests upon the language of a single agency's enabling statute. Accordingly, further review is not warranted.

1. Petitioners mischaracterize the court of appeals' decision when they assert (Pet. 10) that "[u]nder the decision below, * * * statutes that contain specific *disclosure* requirements that go beyond those of the open government laws * * * must now be

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[3] Judge Wald also filed a statement explaining that she did not call for en banc rehearing because it would have been "futile to do so." Pet. App. 18a.

read as sweeping Exemption 3 *prohibitions* on all other kinds of disclosure." The court of appeals made no such broad pronouncement, as Judge Williams recognized in declining to vote for en banc rehearing. See Pet. App. 17a. Instead, the court merely interpreted 42 U.S.C. 2286d(a) and 2286d(g)(3) to prohibit public disclosure of Board recommendations prior to their receipt by the Secretary of Energy or the President. That interpretation is correct and, in any event, does not affect the obligations of other agencies under the Sunshine Act.[4]

Congress enacted the Sunshine Act to provide the public with "the fullest practicable information regarding the decisionmaking processes of the Federal Government * * * while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub. L. No. 94-409, § 2, 90 Stat. 1241. In balancing those goals, the Sunshine Act makes the openness requirements subject to ten listed exemptions. 5 U.S.C. 552b(c)(1)-(10).

Exemption 3 of the Sunshine Act, which is identical to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), provides that the Sunshine Act's open-meeting requirements do not apply to—

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[4] Thus, contrary to petitioners' assertion (Pet. 11-12), the decision below does not address whether the National Transportation Safety Board (NTSB) may rely upon Exemption 3 to close its meetings. The language of the NTSB's enabling statute differs significantly from that of the Board's enabling statute. See 49 U.S.C. App. 1906(a) (NTSB shall publish notice of its recommendations and make copies "available to the public at reasonable cost").

> any portion of an agency meeting * * * where the agency properly determines that such portion * * * is likely to—
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> * * * * *
>
> (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. 552b(c)(3).

The court of appeals correctly concluded that the Board's enabling Act leaves it no discretion to disclose its recommendations prior to their receipt by the Secretary of Energy or the President. Pet. App. 5a-6a. Section 2286d(a) states that the recommendations shall be disclosed to the public "after receipt by the Secretary," 42 U.S.C. 2286d(a), or (in the case of recommendations relating to an "imminent or severe" public health and safety threat) "[a]fter receipt by the President." 42 U.S.C. 2286d(g)(3). As the court of appeals properly determined, the "natural" reading of those provisions "require[s] the withholding of the recommendations until after they have been received by the Secretary or the President." Pet. App. 6a.

That reading is reinforced when Section 2286d is considered as a whole. Section 2286d creates a "careful mechanism for the time-controlled disclosure" of the Board's recommendations and the Secretary's responses. Pet. App. 6a. Receipt of the Board's recommendations by the Secretary or the

President triggers the Board's duties to make them available in public reading rooms, publish them in the Federal Register, and solicit public comments on them. 42 U.S.C. 2286d(a). The date of receipt (or publication) also triggers the 45-day period for the Secretary's response. 42 U.S.C. 2286d(b)(1). Just as publication of the Board's recommendations is to follow "promptly" upon their transmittal to the Secretary, publication of the Secretary's response is to occur "[a]t the same time as" it is transmitted to the Board. 42 U.S.C. 2286d(b)(2). Similarly, the Secretary is required to publish her final decision on the Board's recommendations at the same time as she transmits it to the specified recipients in the Senate and House of Representatives. 42 U.S.C. 2286d(d). As the court of appeals recognized, in the context of these detailed provisions governing the timing and manner of transmittal, publication, and response to the Board's recommendations, "the most obvious reading" of Sections 2286d(a) and 2286d(g)(3) is that " 'after' means 'only after,' " Pet. App. 6a—*i.e.*, public disclosure of the Board's recommendations may occur only after they have been received by the Secretary of Energy or the President.

The court of appeals' conclusion that 42 U.S.C. 2286d(a) and (g)(3) fall within Exemption 3 is also consistent with the legislative history of the exemption. A committee report on the 1976 legislation enacting the Sunshine Act cited Section 801 of the Federal Aviation Act of 1958, 49 U.S.C. 1461 (1976), as an example of an Exemption 3 statute. H.R. Rep. No. 880, 94th Cong., 2d Sess. Pt. 1, at 9-10 (1976). Section 801 was similar to the provisions at issue here, insofar as it required the Civil Aeronautics

Board (CAB) to make public its decisions on certain applications by air carriers only after those decisions had been submitted to the President. See 49 U.S.C. 1461 (1976) ("[c]opies of all applications in respect to such certificates and permits shall be transmitted to the President by the [CAB] before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof"); see also *Aviation Consumer Action Project* v. *Civil Aeronautics Board*, 412 F. Supp. 1028, 1030 (D.D.C. 1976) ("clear and unambiguous" language of Section 801 prohibits publication of a Board decision prior to its submission to the President).

Petitioners nonetheless contend that the Board must open the meetings in which recommendations are discussed, thereby disclosing them to the public before they are transmitted to the Secretary or the President. Petitioners offer no reason, however, why Congress would require the Board to disclose its recommendations to the public before it disclosed them to the officers for whom the recommendations are formulated and who are required by statute to respond to them. That odd result would, as the court of appeals recognized (Pet. App. 6a), render unnecessary the provisions requiring disclosure of recommendations after their transmittal to the Secretary or the President. Petitioners' interpretation thus contravenes the principle that statutes should be interpreted to give effect to their every word. See, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979).

More importantly, petitioners' interpretation cannot be reconciled with the Secretary of Energy's

duty under Section 2286d(h) to prevent the release of classified and other controlled nuclear information. The Board itself is obligated to prevent the release of such information. 42 U.S.C. 2167(a)(3)(B), 2168(a). But the Board cannot always predict when classified or controlled information will be generated in the course of a meeting discussing recommendations for the Secretary or the President. When classified information is created, the Board cannot classify it on its own initiative, because the Board has no independent classification authority. Although DOE does have classification authority, DOE cannot realistically review and prevent release of information that is generated during the course of a public meeting. For these reasons, a critical security function is served by the provision in the Board's enabling Act requiring that it "promptly" publish its recommendations *after* they are received by the Secretary or the President. That provision enables the Secretary to review recommendations and transcripts of deliberations to determine whether they contain material that should be removed prior to publication. At the same time, the public's right to timely access to unclassified and unrestricted information is fully preserved.

Contrary to petitioners' suggestion (Pet. 15), nothing in the legislative history of the Board's enabling Act evinces an intent to require disclosure in derogation of the carefully crafted statutory scheme. Indeed, the legislative history confirms that Congress did not intend the Board's recommendations to be disclosed until after receipt by the Secretary or the President. The original Senate bill creating the Board required it to make unclassified versions of

its recommendations available to the public only "when possible." S. 1085, 100th Cong., 1st Sess. § 212(g)(6)(B) (1987), *reproduced in* S. Rep. No. 173, 100th Cong., 1st Sess. 41 (1987). A parallel bill in the House required the Secretary of Energy (as opposed to the Board) to make the recommendations public "as soon as practicable after receipt." H.R. 4264, 100th Cong., 1st Sess. (as passed on May 11, 1988); see 134 Cong. Rec. D568 (May 11, 1988) (daily digest). In conference, the responsibility for making the recommendations public was transferred from the Secretary to the Board, which was to act "promptly," rather than "as soon as practicable." H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 170 (1988). Neither those changes nor anything else in the legislative history suggests that Congress altered its intention —evident in the bills considered in each House—to require disclosure of recommendations only after they are transmitted to the Secretary or the President.[5]

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[5] Because the court of appeals held that the Board's enabling Act falls within Exemption 3(A) of the Sunshine Act, the court had no occasion to pass on other arguments by the Board that furnished alternative grounds for rejecting petitioners' challenge to the Board's regulation implementing Exemption 3. Specifically, the Board argued that, in light of the detailed provisions governing publication of recommendations set out in the Board's enabling Act, those provisions displaced the Sunshine Act's requirements with respect to Board deliberations on recommendations. Gov't C.A Br. 14-25. In support of that argument, the Board cited, *inter alia*, *Ricchio* v. *Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985), which held that the Presidential Recordings and Materials Preservation Act displaced the FOIA with respect to a request for disclosure of transcripts of White House conversations involving President

2. Petitioners contend (Pet. 12-15) that the court of appeals' decision conflicts with the decision of this Court in *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988). The court of appeals correctly recognized, however, that the situation before this Court in *Julian* is "readily distinguished" from the situation presented here. Pet. App. 7a.

In *Julian*, prison inmates sought disclosure of their presentence reports under the FOIA. At that time, Federal Rule of Criminal Procedure 32 required that a criminal defendant and counsel be furnished with the presentence report "[a]t a reasonable time before imposing sentence." See *Julian*, 486 U.S. at 4 (citing Fed. R. Crim. P. 32(c)(3)(A) and (E), 18 U.S.C. App. at 794 (1988)). In addition, the parole statute required that prisoners be provided with reasonable access to the presentence report "at least 30 days before a scheduled parole hearing." 486 U.S. at 6 (citing 18 U.S.C. 4208(b) (1982)). The Court in *Julian* held that neither Rule 32 nor 18 U.S.C. 4208(b) specifically exempted presentence reports from disclosure, so as to bring those provisions within Exemption 3 of the FOIA. 486 U.S. at 10-11.

The court of appeals correctly identified the critical distinction between the provisions at issue in

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Nixon. The Board also argued that its enabling Act falls within Exemption 3(B) of the Sunshine Act, because it "establishes particular criteria for withholding" and refers to "particular types of matters." 5 U.S.C. 552b(c)(3)(B); see Gov't C.A. Br. 33-39; see also *Lam Lek Chong* v. *United States*, 929 F.2d 729, 733 (D.C. Cir. 1991); *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978). Further review is particularly unwarranted in light of these alternative arguments supporting the court of appeals' decision.

Julian and those at issue here. Pet. App. 7a. The provisions in *Julian* required the disclosure of presentence reports by a specified time *before* the imposition of sentence or an inmate's parole hearing. Logically, a requirement that disclosure be made before a specified time can be satisfied by disclosure at the specified time, or at any earlier time. See Pet. App. 7a; see also Advisory Committee Notes on 1989 Amendment to Fed. R. Crim. P. 32, 18 U.S.C. App. at 1084 (Supp. III 1991) ("Nothing in the * * * rule prohibits a court from requiring disclosure at an earlier time before sentencing."). By contrast, the Board's enabling Act requires disclosure of its recommendations *after* receipt by the Secretary or the President. 42 U.S.C. 2286d(a) and (g)(3). That requirement cannot be satisfied by disclosing the recommendations *before* they have been received by the relevant officers. Pet. App. 8a. Put another way, *Julian* concluded that the statutory term "before" meant "no later than." That does not conflict with the conclusion below that the statutory term "after" means "no earlier than." Thus, the decision below does not conflict with *Julian*.

3. Petitioners assert that the decision below will prevent "public scrutiny of discussions and information going to the very heart of the Board's statutory mission." Pet. 16. That assertion is without merit. This case is about the timing of disclosure, not whether disclosure will occur. The Board remains obligated under its enabling Act to publish its recommendations and to request public comment on them. Moreover, the Board's regulations require it to record any Board meeting closed to the public, including meetings that discuss recommendations

that ultimately are not transmitted. 10 C.F.R. 1704.8. Transcripts of those meetings are made available to the public after they are screened for classified and other access-restricted information. 10 C.F.R. 1704.9, 1703.103(b)(5). The public's ability to scrutinize the Board's activities is thereby preserved within the bounds of the carefully crafted congressional mechanism for the "time-controlled disclosure of the recommendations." Pet. App. 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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